Supreme Court of the United States.

October Term, 1922.

No. 121.

THE UNITED STATES, *Appellant*,

v.

MASON & HANGER COMPANY.

No. 122.

THE UNITED STATES, *Appellant*,

v.

NORTHEASTERN CONSTRUCTION COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES ON REHEARING.

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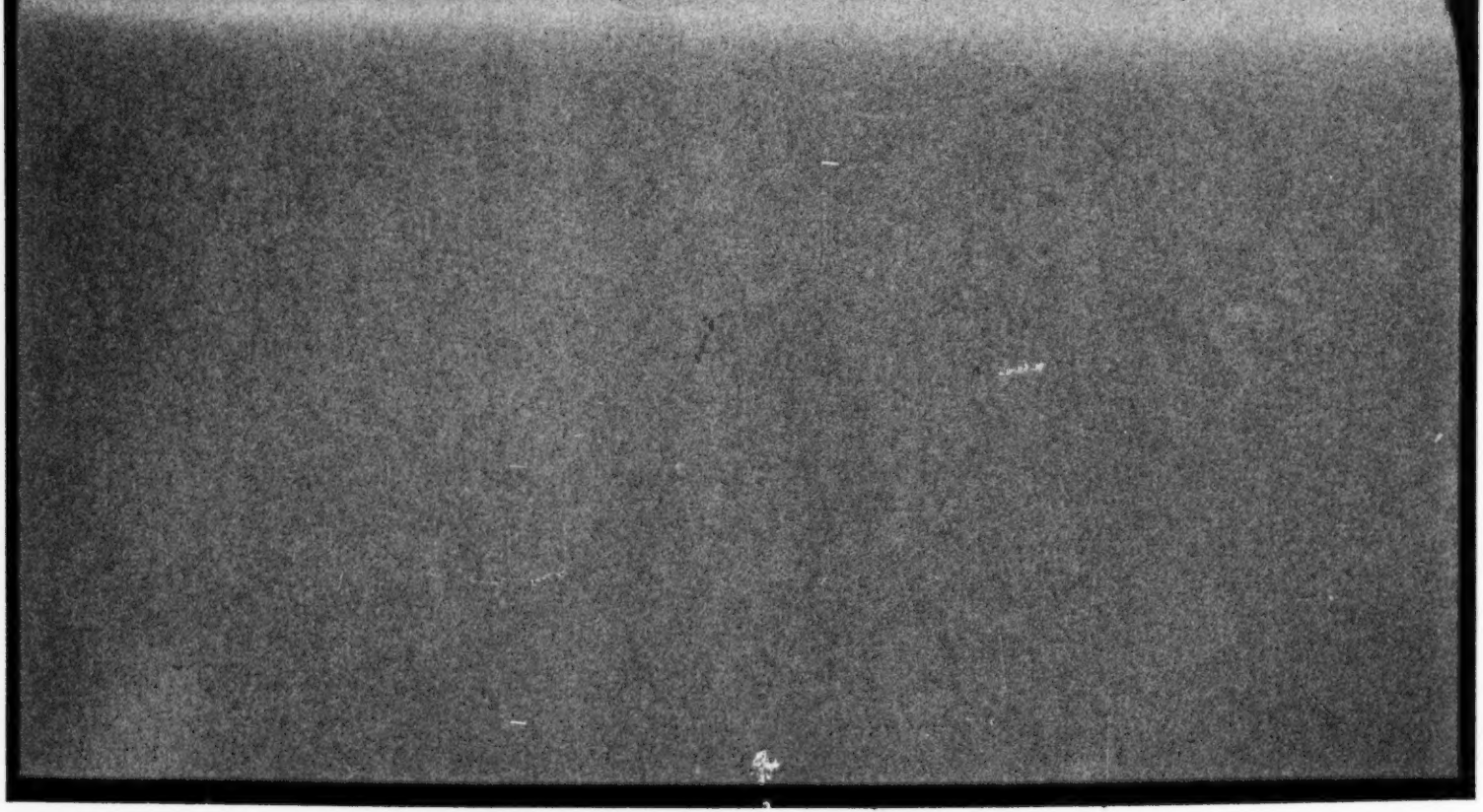

TABLE OF CONTENTS.

I. Statement of the Cases 1
Contract Provisions 2
Statutes 4
II. Brief of Argument 6
(1) Payment was Correct 6
(2) Contemporary Construction 10
(3) Effect of Payment 12
Conclusion 15

TABLE OF CASES.

Beley v. *Naphtaly*, 169 U. S. 353, 364 14
Chicago, Santa Fe, etc. Ry. v. *Price*, 138 U. S. 185 . . 13
D. C. v. *Gallaher*, 124 U. S. 505 11
Goodwin v. *United States*, 10 Fed. Case No. 5554 . 8, 9
Guaranty Co. v. *Pressed Brick Co.*, 191 U. S. 416 . 8
Hazleton Co. v. *Citizens' Ry.*, 72 Fed. 317 9
Hill v. *American Surety Co.*, 200 U. S. 197, 202 . . 8
Kihlberg v. *United States*, 97 U. S. 398 13
Martinsburg & Potomac R.R. v. *March*, 114 U.S. 549 13
Mason & Hanger v. *U. S.* (this case) 56 C. Cls. 238 2
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387 13
Ripley v. *United States*, 223 U. S. 695 13
Sheffield, etc. Ry. Co. v. *Gordon*, 151 U. S. 285 . . . 13
South Portland, 95 Fed. 295 8
United States v. *Barlow*, 184 U. S. 123 13
United States v. *Gleason*, 175 U. S. 588 12
United States v. *Peck*, 102 U. S. 64 10
United States v. *Phisterer*, 94 U. S. 219, 225 15

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THE UNITED STATES, *Appellant*, v. MASON & HANGER COMPANY. } No. 121.

THE UNITED STATES, *Appellant*, v. NORTHEASTERN CONSTRUCTION CO. } No. 122.

Appeals from the Court of Claims.

BRIEF FOR APPELLEES ON REHEARING.

I. STATEMENT OF THE CASES.

These are claims arising under contracts with the War Department for building construction during the war, the former at Camp Zachary Taylor, Louisville, Kentucky, the latter at Astoria, Long Island. The contractor was to be paid the cost of construction plus a fee for services. The claims involve items of reimbursable costs.

In the *Mason & Hanger* case, No. 121, they are as follows:

(1) Premium on bond of $250,000 given by the contractor to the United States for fulfillment of the contract (Finding III, rec. p. 18.)	$2,500
(2) Premium on bond given by the subcontractor to the principal contractor (claimant in this case) for fulfillment of the sub-contract (Finding IV, rec. top p. 19.)	450
(3) Premiums on policies of public liability insurance, automobile liability insurance, and burglary and holdup insurance (Finding V, rec. middle p. 19.)	9,114.52
	$12,064.52

The case of the *Northeastern Construction Company*, No. 122, involves only a premium on the surety bond given by the main contractor for the performance of the contract and is similar to item 1 of the *Mason & Hanger* case, and amounts to $150 (rec. p. 122, p. 14).

The Court of Claims rendered judgment for the full amount claimed in both cases.

The opinion, *Mason & Hanger*, Rec. p. 19; Northeastern rec. p. 15, is reported 56 C. Cls. 238.

The United States does not question the allowance of items 2 and 3 of the *Mason & Hanger* case. The only error alleged is as to the allowance of item 1 of the *Mason & Hanger* case and of the entire amount in that of the *Northeastern Construction Company*.

References throughout this brief are to the *Mason and Hanger* record, No. 121, unless otherwise stated.

The premium in question was paid to the contractor by the United States as a part of the costs of the contract, in the regular course of business, rec. p. 18. Under a ruling of the Comptroller of the Treasury, it was, over two years later, deducted from money due the contractor on another account. See also record in Northeastern Construction Company case, p. 4, Finding III.

Contract Provisions.

The portions of the contract material to this case are as follows:

Article II, rec. pp. 6, 8:

"Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

* * * * * * *

"(h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and

such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor."

Article IV, rec. p. 9:

"Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to three and one-half per cent (3½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate not exceeding three and one-half per cent (3½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

Article IX, rec. p. 13:

"Bond.—The contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred fifty thousand ($250,000) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

Article XIV, rec. p. 14:

"Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto."

Article XV, rec. p. 15:

* * * * * * *

"It is understood and agreed that wherever the words 'contracting officer' are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer."

Statutes.

Act of August 13, 1894, Sec. 1, Ch. 282, 28 Stat. 279:

'Whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing any-

thing in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

Act of February 14, 1905, Ch. 778, 33 Stat. 812:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

This statute with some supplemental provisions for its proper execution is embodied in the Army Regulations, 1913 edition, as Paragraphs 569 to 581. By Par. 569, "The amount of penalty in a contractor's bond will be fixed by the contracting officer," etc., followed by provisions of minimum and maximum limits.

II. BRIEF OF ARGUMENT.

Appellees maintain:

(1) The payment of the bond premium as one of the costs of the contract was only what a correct construction of the contract required.

(2) The contemporary recognition by the War Department that the contract required payment of this and other like bond premiums is the best proof that this was a correct construction.

(3) The payment of the bond premium in the manner provided by the contract is made by the contract conclusive upon both parties.

(1) *Payment was Correct.*

The payment of the premium here claimed was precisely within the terms of the contract. One of the costs which the United States agreed to pay is (Article II, quoted, *ante*, foot p. 2):

"(*h*) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require."

Article IX, quoted, *ante*, p. 4, specifically requires the contractor to furnish a bond prior to commencing the work.

The act of 1905, *ante*, p. 5, requires that a bond be given. That of 1894, *ante*, p. 4, requires that it be approved by the contracting officer.

This bond "was required and approved by the contracting officer" (Finding III, two-thirds down p. 18). The fact that it was also required by statute is no objection to its inclusion as a part of the cost of the work. On the contrary, the right is even more clearly apparent when it was required, not merely by the contracting officer, but also by law.

The bond premium is therefore a *reimbursable* cost.

It is objected that this cost was not an "*expenditure in the performance of said work*" and therefore not reimbursable under the language of Article II, Record, p. 6, *ante*, p. 2, providing reimbursement "*for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items.*" It is fallacious to treat these general introductory words as controlling the later particular words in the several clauses thereafter defined. Bonds, if approved as required, are expressly, par. (h), Record, top p. 8, *ante*, foot p. 2, recognized as costs under the contract. The general clause in the introduction must be read in the light of the later particular definitions.

But even if this general clause is the literal test of inclusion, one of the obligations of this contract is to give this particular bond. Its cost is therefore an expenditure in the performance of this work. It is one of a class of costs, neither for materials nor for labor, required by modern business methods, such as fire insurance, insurance against workingmen's casualties or against accidents to property or to other persons and rental of machinery. All these are no less actual costs of the contract than expenditures for materials and labor. The contract recognizes all of these as reimbursable costs and the War Department was right in including the cost of securing the guaranty bond as a part of the cost of the work.

A complete answer to such over-refinements is found in Article XIV, *quoted ante*, p. 4, providing that the contract shall be interpreted as a whole and that the intent of the whole is to govern. The intent of the contract is to *reimburse* the contractor's costs and to pay a fixed profit above the costs. The court will take

judicial notice that bonds are now purchased from surety companies. See *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 423, 424; *Hill* v. *American Surety Co.*, 200 U. S. 197, 202; *The South Portland*, 95 Fed. 295. The cost of the bond forms a part of the cost of the performance of any building contract equally with material and labor. Under a lump sum contract, the contractor must include the bond premium among his costs. Profit does not begin until after the bond, equally with other costs, is paid for. The general intent of the contract makes it as necessary to reimburse a contractor for the cost of his bond as for the cost of the wood and iron entering into the construction. The interpretation of the contract asserted by appellant would compel the contractor to bear a very necessary element of the cost and would deprive him to that extent of the stipulated profit. This was the view of the court below, saying, rec., p. 20:

"It is difficult to understand why the premium on such bond is not a part of the cost of the contract. It had to be given and approved before the contract could take effect; it was a cost which the contractor was called upon to incur; it was a cost moreover which the contract itself provided for; it can not be said that it is separate and distinct from the contract, and not a part of it."

Federal courts of high authority have referred to the difficulty of ascertaining the elements which should enter into any computation of cost. Thus, as far back as 1811, Mr. Justice Washington said:

"The whole cause turns upon the legislative meaning of the word cost. * * * The term is certainly of equivocal meaning, and is sometimes used to express the value of a thing, and sometimes the price paid for it. * * * What then constitutes the actual cost

of an article at any particular place, which is purchased there for the purpose of being exported and which is actually exported? The answer is, the price given, and every charge which attended the purchase and the exportation, paid or supposed to be paid, at the place whence the article is exported. The actual cost of a bale of goods purchased at Liverpool, is composed of the price paid for it, or in other words, the prime cost and charges, including commissions on the purchase, the packages, if any, and if the goods were purchased at the manufactory, then it includes not only the prime cost, and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others." *Goodwin* v. *United States*, 10 Fed. Cases, No. 5,554, p. 627.

In 1896, the United States Circuit Court for the Western District of Tennessee repeated the same thought, *Hazleton Tripod Boiler Co.* v. *Citizens' Street Railway Co.*, 72 Fed. 317, 321:

"We are all familiar with the seemingly insuperable difficulty of ascertaining the cost, for example, of producing a pound of cotton or of making a yard of cloth; and perhaps no two persons engaged on the problem would agree on the prime elements of the calculation, as none of the parties, witnesses, or the master can agree on them in this case."

The items of cost were subjected to the decision of a reliable and impartial officer. Many circumstances show that both parties from the beginning to the end of the execution of this contract regarded the premium on the surety bond as a part of the cost of performance of the contract. Even before any such contracts were let the Secretary of War "directed that such premiums should be treated as part of the cost of the work," and insisted on the surety companies reducing their premiums.

(2) *Contemporary Construction.*

The contemporary action of the War Department shows that its officers, directly concerned with the negotiation of such contracts, regarded the bond premium as a reimbursable cost. The Court of Claims has found (Finding III, p. 18:

(a) That before such contracts were signed the War Department and the surety companies negotiated and agreed upon the cost of bonds;

(b) That the Secretary of War directed that such premium should be treated as part of the cost of the work;

(c) That the officer in charge of cantonment construction directed that no bond should be transmitted not conforming to the agreed premium;

(d) That five hundred or more such premiums were reimbursed to contractors;

(e) That the Comptroller's decision disallowing such an item as a part of the cost of the work was not made until January, 1920.

All such circumstances are material to the proper construction of the contract. *United States* v. *Peck*, 102 U. S. 64, 65.

The court below said, rec., p. 20, that these facts showed the War Department's "purpose and intention to pay the cost of such bonds." The original opinion of this court said:

"What is the import of this practical interpretation? The Government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer to express and provide for the purpose of the Government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent

conduct is necessarily to be considered a definition of them. The officer in a sense is a party to the contract, not only representing but speaking for the impersonality of the Government. Competent, therefore, it would seem, to declare the meaning of the contract."

This is a much stronger case of contemporaneous construction than was decided by this court in *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510, where the court said:

"The whole controversy between the parties as to this item, and also for a portion of the claimants' demand on account of extra work and material, arises out of the fact that the letter of the contract and specifications does not correspond with the plan of the work as furnished by the District engineer and the sample of the work which had been done previously by other contractors, and with which that of the present claimants was to connect. The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

That was a case coming from the Court of Claims and involved the liability of the District of Columbia, then as now a mere branch or agency of the United States Government. The court there gave controlling effect to a contemporaneous construction contrary to the letter of the contract.

In the present case the construction given to the language by the parties at the time of the execution of

the contract was certainly a natural one. We think it was the only natural one. The fact that the parties concurred in that construction should be controlling as to its correctness.

(3) *Effect of Payment.*

Article IV, quoted, *ante*, p. 3, details the method of payments to the contractor, upon statements prepared by the contractor and the contracting officer, but subject to the control of the contracting officer.

This is followed by the provision:

"The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

"All payments" are so made final, not merely disputed payments.

The findings of the Court of Claims, Finding III, foot p. 18, after reciting the payment of the premium to the surety company by the contractor, say:

"Subsequently the said sum of $2500 was paid to plaintiff by the United States in August, 1917, as a part of the costs of the work. Five hundred or more of such payments were made by the United States to contractors who had cost plus contracts with the United States."

Claimant's right to this sum was thereby fixed. The rule of law governing these conditions is exactly stated in *United States* v. *Gleason*, 175 U. S. 588, 602:

"Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of

fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts. *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549; *Chicago, Santa Fe, &c. Railroad* v. *Price*, 138 U. S. 185."

The original opinion of this court in the present case applied this rule, saying:

"We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg* v. *United States*, 97 U. S. 398; *Martinsburg & Potomac Railroad Co.* v. *March*, 114 U. S. 549; *United States* v. *Gleason*, 175 U. S. 588; *Ripley* v. *United States*, 223 U. S. 425. This is extending the rule between private parties to the Government.

"There were such decisions, and settlement, and payments, in consequence of them, as we have seen. Over the effect of these the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect."

The application of this rule to the United States, referred to in the opinion, is as old as the *Kihlberg* case, above cited, and was approved not only in the two cases cited but in *United States* v. *Barlow*, 184 U. S. 123, 133, and very recently in *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393. See also *Chicago, Santa Fe and California Ry. Co.* v. *Price*, 138 U. S. 185, 193; *Sheffield, &c. Ry. Co.* v. *Gordon*, 151 U. S. 285, 292.

The Decision Official, not Personal.

The term "contracting officer" extends by Article XV, quoted, *ante*, p. 4, to "his successor in office, any other person to whom the duties of the contracting

officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer." This answers completely the suggestion that there is a difference in legal effect between the action of the original contracting officer and that of his successor.

The rule in *Beley* v. *Naphtaly*, 169 U. S. 353, 364, applies:

> "The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office."

It is argued that the discretion here exercised was beyond the scope of the authority granted. But the language is too clear (Article II, Record, p. 6, and top p. 8, *ante*, foot p. 2) "The contractor shall be reimbursed for" * * * "Such bonds * * * as the contracting officer may approve or require." The contracting officer had jurisdiction to approve and did approve. It was then his duty to certify the cost of bond for payment. The payment was made. When made, it was final and binding.

It is of no force against this position to cite cases holding that no officer of the government has power to bind the United States beyond his delegated authority. The authority here exercised was given by the contract. Such authority this court has repeatedly held valid.

CONCLUSION.

Apprehension is expressed on behalf of the United States that the announcement of the principle contended for by the appellees in these cases may afford a precedent of a kind which they do not desire in other litigation in which the United States is or may hereafter become engaged. The declaration of a sound principle in an appropriate case will rightly serve as a guide to justice in later cases. It is not correct to argue against such a declaration merely because it may be quoted in some other cases to which it may or may not be applicable.

As stated in *United States* v. *Phisterer*, 94 U. S. 219, 225:

"The briefs submitted contain suggestions of what would be the result in various cases, which, it is said, may arise under these regulations. Our judgment is intended to be given upon the precise case before us, and upon no other. Should other cases be presented, the Court of Claims will give them the attention required, as will this court, should they come here. Both courts have business enough to occupy them, without anticipating cases which may never be presented."

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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